Nos. 90-408 and 90-577
CONSOLIDATED

In The

Supreme Court of the United States

October Term, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,

Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,

Cross-Petitioner,

v.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Cross-Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE MASHANTUCKET PEQUOT TRIBE, ASSINIBOINE AND SIOUX TRIBE OF THE FORT PECK RESERVATION, BLACKFEET TRIBE OF THE BLACKFEET RESERVATION, CHEROKEE NATION OF OKLAHOMA, CHEYENNE RIVER SIOUX TRIBE, (additional amici listed inside) IN SUPPORT OF RESPONDENT/CROSS-PETITIONER CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION

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Oneida Tribe of Indians of Wisconsin,
Poarch Band of Creek Indians,
Rosebud Sioux Tribe,
Shoshone-Bannock Tribes,
Skokomish Tribe,
Squaxin Island Tribe,
Turtle Mountain Band of Chippewa Indians, and
National Congress of American Indians

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INTEREST OF THE AMICI CURIAE

Amici curiae[1] are fifteen (15) federally-recognized Indian tribes and one national Indian-interest organization.[2] All of the *amici* tribes have governing bodies and exercise jurisdiction over their tribal territory including land owned by their members. *Amici* have a substantial interest in the issues raised in this case. The County of Yakima is attempting to tax on-reservation lands owned in fee by the Yakima Indian Tribe and individual tribal members, and Indian activities related to those lands. Such taxation would be a significant infringement upon *amici* tribes' right to govern their members and territory.

In addition, such taxation likely will further diminish the land base of Indian people. Through the policies carried out under the General Allotment Act of 1887, tribes lost almost 90 million acres of land. They cannot afford to lose any more. Indeed, tribes today are striving to enlarge their land base and preserve their precious remaining resources. These efforts are supported by federal policies which encourage tribal self-determination and economic self-sufficiency.

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[1] Counsel for Petitioners and counsel for Respondents have consented to the filing of the brief of *amici* in support of the Respondent/Cross-Petitioner, Confederated Tribes and Bands of the Yakima Indian Nation. The consents are submitted for filing herewith.

[2] The National Congress of American Indians is a private, non-profit organization established in 1944. It is the oldest and largest Indian membership organization.

Amici submit the attached brief to urge the Court to find that the County taxes at issue here are inapplicable.

SUMMARY OF ARGUMENT

Absent congressional authorization, states or their political subdivisions cannot tax Indian lands or activities within Indian reservations. Before state taxation is permitted, Congress must manifest its intent to override the federally-acknowledged tribal barriers to such state taxation in unmistakably clear terms. This rule is founded upon the doctrines of tribal sovereignty and federal preemption which protect tribal rights to self-government and the concomitant right to be free from state jurisdiction over their members within their territories.

The Burke Act proviso of the General Allotment Act of 1887, upon which the County here relies for its authority to tax reservation Indian fee lands and activities, does not even address these tribal barriers, much less override them. The proviso's reach is limited. It merely permits, *inter alia*, the removal of an individual Indian allottee's immunity from state property taxes through the issuance of a valid fee patent.

State taxation of Indian fee lands will likely lead to the loss of land and result in aggravating the poverty now existing on Indian reservations. The County's taxes should be struck down as inconsistent with congressional policy which encourages the rebuilding of tribal land bases and tribal economies.

I. STATES AND THEIR POLITICAL SUBDIVISIONS CANNOT TAX INDIAN FEE LANDS AND ACTIVITIES WITHIN A RESERVATION WITHOUT EXPRESS AUTHORIZATION FROM CONGRESS: NO SUCH AUTHORIZATION EXISTS HERE.

A. Under This Court's *Per Se* Rule, Tribal Barriers To State Taxation Can Only Be Abrogated In Unmistakably Clear Terms.

This case involves an attempt by the County of Yakima ("the County") to assert taxing jurisdiction over Indian fee lands and activities within an Indian reservation. The County's claim must be rejected because federal law prohibits such jurisdiction by a state or its political subdivisions.

Generally, absent express congressional authorization, states have no authority over Indians within their reservations.[3] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-142 (1980); *Williams v. Lee*, 358 U.S. 217, 220 (1959). This rule is even stronger when dealing with state jurisdiction to tax. "In the special area of state taxation of Indian tribes and members, [the Court] has adopted a *per se* rule" against state jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("*Cabazon*").[4]

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[3] While this case involves Indian fee land within a reservation, reservation status is not the only source of tribal barriers to state taxation. *See, e.g.*, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. ___, 111 S.Ct. 905 (1991).

[4] The County concedes the applicability to this case of the general rule that states cannot tax Indians within their reservations absent express congressional consent. County Op. Br. at 9.

The *per se* rule articulated in *Cabazon* is the culmination of a long line of this Court's decisions recognizing tribal sovereignty and federal preemption as barriers to state taxing jurisdiction over tribal Indians and their lands (hereinafter "tribal barriers"). *E.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142-143; *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) ("*Moe*"); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *accord Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. ___, 111 S.Ct. 905 (1991) ("*Potawatomi*"); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The corollary of the *per se* rule is that while Congress can override the tribal barriers to state taxation, it must do so in "unmistakably clear" terms. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 765. Therefore, before the County can tax Indian fee lands or activities on a reservation, it must show in unmistakably clear terms that Congress intended to abrogate tribal barriers to state jurisdiction. The alleged congressional authorization proffered by the County here does not address, much less overcome, these tribal barriers.

B. The Burke Act Proviso Authorized The Removal Of An Allottee's Individual Right To Tax Immunity, But Had No Effect On The Tribe's Right To Exclusive Jurisdiction Over Its Members And Their Fee Lands Within A Reservation.

The County relies upon the proviso of the Burke Act for its taxing authority.[5] 25 U.S.C. § 349. The Burke Act is an amendment of the General Allotment Act of 1887 ("GAA").[6] As will be explained, the Burke Act has one provision addressed to removal of the tribal barriers to state jurisdiction and one provision addressed to removal of the barrier erected by virtue of the trust status of the allotments. The County relies upon the latter provision to remove the tribal barriers. This it cannot do.

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[5] The Burke Act is set out in pertinent part below. The proviso relied upon by the County is italicized.

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside; . . . *Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . .*

Act of May 8, 1906, 34 Stat. 182, *codified* at 25 U.S.C. § 349.

[6] 24 Stat. 388, *codified as amended* at 25 U.S.C. §§ 331-334, 339, 341, 348, 349, 354, 381.

At the time the GAA was enacted, tribes had been placed on reservations through treaties, agreements, and statutes. *See generally* F. Cohen, *Handbook of Federal Indian Law* 127-139 (1982 ed.). Under the reservation system, the tribes held their lands in common. Rapid westward expansion and population growth led to increased demands by non-Indians for Indian lands and resources.

The GAA addressed both the assimilation of the Indian and the white settlers' demands for land. Congress believed that as individual landholders, Indians would require less land than in their tribal status. Thus, many reservations were allotted in severalty to individual Indians, after which the surplus lands not needed for allotment were made available to white settlers. *See Solem v. Bartlett*, 465 U.S. 463, 466-468 (1984).

The federal government held the allotments in trust for the individual Indian allottees for a period of twenty-five years. 25 U.S.C. § 348. During the trust period, the lands could not be alienated and were immune from state taxation. *See United States v. Mitchell*, 445 U.S. 535, 544 (1980). This was considered necessary to allow the individual Indians time to adjust to the demands of the dominant society and the eventual responsibilities of citizenship. *Id.* After the expiration of the trust period, a fee patent to the land would be issued to individual Indians. 25 U.S.C. § 349. When all the lands had been allotted and the trust periods had expired, the reservations could be abolished. *Moe*, 425 U.S. at 479. The abolishment of the reservations and tribal governments were the long-range goals of the GAA. *See United States v. Montana*, 450 U.S. 544, 559 n.9 (1981). These goals were to be accomplished gradually through a multi-step process. *Id.*

The trust status of the allotments provided an individually-held protection for the allottees. In *Choate v. Trapp*, 224 U.S. 665 (1912), this Court recognized that the immunity from state taxation of allotted trust land is a constitutionally-protected property interest that is vested in individual tribal members.

> [T]he provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon [the state].

224 U.S. at 673, *citing The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756 (1867).

In the present case, the Burke Act proviso authorizes the removal only of this individual right to be immune from state property taxes. The proviso does not address the tribal barriers to state jurisdiction. These barriers are addressed in another part of the Burke Act, the first sentence, which provides:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal of the State or Territory in which they may reside. . . .

25 U.S.C. § 349.

This was the language of the Burke Act involved in *Moe*, and *Moe* made clear that this language relates to the

tribal barriers to state jurisdiction.[7] Indeed, *Moe* affirmed that the tribal barriers to state taxing jurisdiction were not abrogated under that language. *Moe*, 425 U.S. at 478-479. *See also Bryan v. Itasca County*, 426 U.S. at 386. Thus, under *Moe*, the tribal barriers to state jurisdiction survive the Burke Act.

Significantly, several states share *amici's* view that the tribal barriers to state jurisdiction over tribal and individual Indian fee lands within reservations have never been abrogated. *See, e.g.*, Oregon Op. Att'y Gen. 83-15 (1983); Nevada Op. Att'y Gen. 88-19 (1989); North Dakota Op. Att'y Gen. 85-12 (1985); *Battese v. Apache County*, 630 P.2d 1027 (Ariz. 1981).

Finally, since the allotment era, Congress has confirmed that fee lands within an Indian reservation are "Indian Country" subject to federal, not state jurisdiction. In 1948, Congress enacted the Indian Country statute, defining "Indian Country," in pertinent part, as follows:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United

[7] In the present case, the County relies on the holding in Goudy v. Meath, 203 U.S. 106 (1906), that this language authorized state taxation of Indian fee lands within reservations, for its authority to tax. The County's reliance is misplaced. Goudy involved an Indian who had severed his tribal relations; a fact not present in the instant case in which the tribal members have maintained deeply rooted relations with the tribe. Moreover, in Moe, the Court rejected the argument that Goudy authorized the state to tax tribal Indians within a reservation based on this language. 425 U.S. at 477. Goudy itself was premised on Matter of Heff, 197 U.S. 488 (1905), which was overruled in United States v. Nice, 241 U.S. 591 (1916).

> States Government, *notwithstanding the issuance of any patent*, and including rights-of-way running through the reservation. . . .

18 U.S.C. § 1151(a) (emphasis added).

This definition expressly encompasses Indian fee patents within an Indian reservation.[8] Section 1151(a) was a codification of pre-existing case law establishing that federal jurisdiction over Indian fee lands is paramount, and that state jurisdiction is excluded. *See, e.g., United States v. Sandoval*, 228 U.S. 243 (1913). This Court subsequently has noted that the Indian Country statute provides protection to tribal governments as well because under it, tribal jurisdiction is coextensive with federal jurisdiction. *Cabazon*, 480 U.S. at 207 n.5, *citing DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

Under this Court's *per se* rule, tribal barriers to state taxation can only be abrogated in unmistakably clear terms. The Burke Act proviso relied upon by the County for its authority to tax reservation Indians and activities removed the individual allottee's right to tax immunity upon issuance of a valid fee patent, but has no effect on the tribe's right to exclusive jurisdiction over its members and their fee lands within a reservation. Therefore, the County has no authority to impose the taxes at issue here.

[8] *See also* the Indian Gaming Regulation Act of 1988, 25 U.S.C. § 2703(4) (defining "Indian lands" to include "all lands within the limits of any Indian reservation").

II. THE IMPOSITION OF THE COUNTY TAXES AT ISSUE HERE IS INCONSISTENT WITH CONGRESSIONAL GOALS OF TRIBAL SELF-GOVERNMENT AND ECONOMIC SELF-SUFFICIENCY THAT HAVE BEEN THE CENTRAL FOCUS OF FEDERAL INDIAN POLICY SINCE THE 1930s.

Today, strengthening Indian tribes and their resources is the focal point for federal Indian policy. Beginning with the *Meriam Report*[9] in the 1920's, and continuing to the present, congressional policy has emphasized tribal governments and landholdings as a means of tribal self-determination and economic self-sufficiency. This policy was formally instituted with the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 ("IRA").

In enacting the IRA, Congress clearly connected Indian ownership of land and Indian economic survival. Congress' foremost concerns were to improve the economic situation of Indians by stopping further land loss through allotments, and to revitalize tribal governments. Hearings on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934). "The overriding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

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[9] Institute for Government Research, The Problem of Indian Administration (L. Meriam ed. 1928).

The prime sponsor of the IRA, Representative Howard, recognized that loss of land through the GAA produced widespread poverty among reservation Indians. 78 Cong. Rec. (Part II) 11727, S3645 (daily ed. July 15, 1934). Thus in enacting the IRA, Congress preserved the remaining lands to tribes and their members, supported the acquisition of new lands for what had become the "landless" Indians, and provided a framework whereby tribes exercised a stronger role in governing their members and resources.

Strengthening tribal governance has been the emphasis of virtually every major piece of federal legislation since the IRA addressing the status of tribes and programs for their benefit.[10] *E.g.*, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n; the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963; and the Indian Land Consolidation Act of 1983, 25 U.S.C. §§ 2201-2211. This Court recently noted that: "These Acts reflect Congress' desire to promote the 'goal of Indian self-government, including its "overriding" goal of encouraging tribal self-sufficiency and economic development.'" *Potawatomi*, 111

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[10] The single exception to this was the federal government's disastrous experiment during the 1950's with the now thoroughly repudiated policy of Termination. President Richard Nixon renounced the Termination policy because it ignored the moral and legal obligations involved in the special relationship between tribes and the federal government. Special Message to Congress on Indian Affairs, [1970], Pub. Papers 564, 565-566 (Richard M. Nixon).

S.Ct. at 910. Most recently, Congress unequivocally declared that, "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4).

These policies and goals concerning Indians are shared by the Executive Branch. This year, President George Bush issued a policy statement reaffirming the government-to-government relationship between the federal government and Indian tribes. The President noted that, "the concepts of forced termination and excessive dependency on the Federal Government must now be relegated, once and for all, to the history books [as] we move forward toward a permanent relationship of understanding and trust. . . . " Presidential Statement of June 14, 1991. More specifically, the federal government is publicly advocating its view that the County taxes in this case are unauthorized and inconsistent with federal Indian policy. *See* Brief of United States as *Amicus Curiae* in this case.[11]

In the midst of firmly established federal protections insulating reservation Indians from state taxation, including comprehensive legislation preserving Indian lands and promoting tribal communities, the County should not be allowed to impose its taxes. The result of such an imposition would be to render many reservation Indians landless once again – the very consequence these policies and goals are meant to prevent from occurring. Indeed, as

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[11] This is consistent with previous opinions of the Solicitor General of the Department of the Interior on this issue. *See, e.g.*, BIA.PN.1641, March 15, 1990; BIA.IA.0389, May 25, 1984.

tribes and their members struggle to overcome the long and difficult history of dependency and economic privation, their remaining land is the keystone to realizing a future determined by their own efforts.

There is yet another reason to reject the result argued for by the County here. It would be a bitter irony for this Court to stay the hand of the State from applying personal property taxes on automobiles or sales taxes on cigarettes to reservation tribal members based on the language of the Burke Act at issue in *Moe*, but then to conclude that the even less compelling language from that same section allows the County to apply its real property taxes to Indian-owned fee lands within reservations.

Finally, *Amici Curiae* counties bemoan the potential loss of revenue to be collected from Indian and tribal owners of fee lands. Brief of the Washington State Association of Counties at 6-9. But who are these delinquent taxpayers? They are Indian people, the poorest of the poor by every means and measure. In 1974, Congress noted that "[a]ll the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today there is almost a total lack of an economic community." H.R. Rep. No. 93-907, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2873, 2874. Once their land is gone, these landless people will appear on the welfare rolls of the very tribes that here argue for a result that will avoid such an outcome. As Congress recently observed, "Indian tribes have the primary responsibility for protecting and ensuring the well-being of their members. . . . " 25 U.S.C. § 2401(12). Ironically, the tribes will

then turn to the federal government, not the state governments or their political subdivisions, for the assistance they need to relieve their burden. It cannot be that Congress intended such a ghost of the GAA to survive in this form.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Ninth Circuit should be reversed regarding the applicability of the *ad valorem* taxes on Indian and tribal fee lands within the reservation. The decision of the Court of Appeals should be affirmed regarding the invalidity of the excise taxes on transactions involving such lands.

Respectfully submitted,

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